

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

_____	)	
Schiermeyer,	)	
	)	
Plaintiff,	)	
	)	Case No. 2:23-cv-00589-HCN-DAO
vs.	)	
	)	
Thurston, et al.,	)	
	)	
Defendants.	)	
_____	)	

**MOTION HEARING VIA ZOOM BEFORE THE  
HONORABLE JUDGE HOWARD C. NIELSON, JR.**

Tuesday, January 9, 2024

Time: 2:00 p.m. to 3:00 p.m.

Reported by Teena Green, RPR, CRR, CBC

Orrin G. Hatch United States Courthouse  
351 South West Temple, 7.430  
Salt Lake City, Utah 84101  
(801) 910-4092  
teena\_green@utd.uscourts.gov

APPEARANCES

FOR THE PLAINTIFF:

ABRAM I. MOORE  
K&L GATES LLP  
70 W. Madison Street, Suite 3100  
Chicago, IL 60602  
(312) 372-1121  
abe.moore@klgates.com

CAMERON J. CUTLER  
SNELL & WILMER LLP  
15 West South Temple, Suite 1200  
Salt Lake City, UT 84101  
(801) 257-1828  
ccutler@swlaw.com

MONICA S. CALL  
FOLEY & LARDNER LLP  
95 South State Street, Suite 2500  
Salt Lake City, UT 84111  
(801) 401-8917  
mcall@foley.com

FOR THE DEFENDANT:

DANIEL J. WADLEY  
GREENBERG TRAURIG PA  
222 South Main Street, Suite 1730  
Salt Lake City, UT 84101-2185  
(801) 478-6910  
wadleyd@gtlaw.com

MICHAEL GRAHAM RHODES  
COOLEY LLP  
3 Embarcadero Center, 20th Floor  
San Francisco, CA 94111  
(415) 693-2181  
rhodesmg@cooley.com

January 9, 2024

2:00 p.m.

**P R O C E E D I N G S**

**THE COURT:** All right. Good afternoon.

We're here for a video scheduling conference in *Eric Schiermeyer versus True North United Investments, LLC, et al.* It's Case No. 2:23-cv-00589.

The purpose of this status conference is to discuss logistics for addressing the three pending motions:

Docket No. 88, True North's motion for a preliminary injunction;

Docket No. 89, Blockchain Game Partners' motion to compel arbitration or, in the alternative, to dismiss;

And, Docket No. 90, Mr. Schiermeyer's motion to dismiss.

First, though, we'll begin with appearances for the record.

First, counsel for the plaintiff and counterclaim defendant, Mr. Schiermeyer.

**MR. MOORE:** Good afternoon, Your Honor. Abe Moore appearing pro hoc vice on behalf of Plaintiff Eric Schiermeyer.

**THE COURT:** All right. Welcome, Mr. Moore.

**MR. CUTLER:** And, Your honor, Cameron Cutler as well for Mr. Schiermeyer.

**THE COURT:** And welcome, Mr. Cutler.

All right. Counsel for the Defendant and

1 Counterclaim Plaintiff and Crossclaim Plaintiff True North.

2 **MR. WADLEY:** Good afternoon, Your Honor. Daniel  
3 Wadley from Greenberg Traurig for True North and for Wright  
4 Thurston. And with me today is Michael Rhodes, who's been  
5 admitted pro hoc vice as well.

6 **THE COURT:** All right. Thank you.

7 Welcome, Mr. Wadley, welcome Mr. Rhodes.

8 So I gather from that that you represent Mr. Thurston  
9 as well as True North.

10 **MR. WADLEY:** Correct, yes. That is correct.

11 **THE COURT:** All right. Very well.

12 Finally, counsel for Blockchain Game Partners. I  
13 know the status -- you had a different status and two different  
14 cases that were consolidated but, at a minimum, you're a  
15 crossclaim defendant.

16 **MS. CALL:** That's right, Your Honor. Monica Call  
17 from Foley & Lardner on behalf of Blockchain Game Partners,  
18 Inc.

19 **THE COURT:** All right. Welcome, Ms. Call.

20 **MS. CALL:** Thank you.

21 **THE COURT:** All right. Are there any other lawyers  
22 on the call that need to enter appearances?

23 All right. Very well.

24 Okay. Now, because we are holding this hearing by  
25 videoconference and because there's quite a few lawyers

1 involved, we need to be careful to help the reporter create an  
2 accurate transcript. So please speak slowly and clearly.  
3 Please do not speak over each other or interrupt and please  
4 speak only when directed. And finally, please put your  
5 microphone on mute when you are not speaking, to reduce  
6 background noise.

7 All right. What I want to discuss first is whether  
8 it makes sense for the parties to brief and me to resolve the  
9 three pending motions simultaneously, or whether it would  
10 instead make sense for the parties to first brief and for me to  
11 decide the order -- well, rather, let me rephrase that --  
12 whether it would make sense to treat the motions in a  
13 particular order.

14 And one thing that comes to mind, and I guess I have  
15 a question, does anyone think that all of the counterclaims and  
16 crossclaims against Mr. Schiermeyer, as well as against  
17 Blockchain Games, on which the motion for a preliminary  
18 injunction is based, are subject to arbitration?

19 I know there's a motion to compel arbitration. I  
20 know that Blockchain at least thinks that some of the  
21 crossclaims or some of the claims are subject to arbitration.

22 Does anyone think that all of the counterclaims and  
23 crossclaims on which the pending motion for a preliminary  
24 injunction is based are subject to arbitration?

25 Let me just ask you in turn.

1 I'll start with you, Ms. Call.

2 **MS. CALL:** Thank you, Your Honor.

3 Yes, we believe that all the claims against  
4 Blockchain Game Partners as a direct defendant, in this case a  
5 crossclaim defendant, are subject to arbitration, because all  
6 of them are dependent on either their direct contract claims or  
7 their claims that relate to the agreement between the parties  
8 that compels arbitration.

9 **THE COURT:** Right. What about the -- do you have a  
10 position on whether the claims against Mr. Schiermeyer would be  
11 subject to arbitration?

12 **MS. CALL:** We do not.

13 **THE COURT:** All right. What about -- I guess,  
14 Mr. Moore, Mr. Cutler, I know that you did not move to compel  
15 arbitration.

16 Do you have a view on that?

17 I know that -- I gather that the arbitration  
18 agreement would be between Blockchain Games and Mr. Thurston,  
19 but I also know that it appears -- and many arbitration  
20 agreements have fairly broad language.

21 And do you have a position on that? Do you think  
22 that the claims against your client that underlie the  
23 preliminary injunction are subject to arbitration? Have you  
24 thought about that or considered it?

25 **MR. MOORE:** Thank you, Your Honor. The claims that

1 underlie this motion for preliminary injunction are derivative  
2 claims filed by True North as a shareholder against Eric  
3 Schiermeyer as a director. And particularly, we understand  
4 that the motion is based upon Counterclaim 6, which is the  
5 motion to appoint the custodian. That claim is not subject to  
6 arbitration, in our view, and nobody's moved to compel  
7 arbitration of that particular claim.

8 **THE COURT:** Right. Because technically it's a  
9 derivative claim on behalf of Blockchain against  
10 Mr. Schiermeyer.

11 **MR. MOORE:** Correct, Your Honor.

12 **THE COURT:** Okay. That makes sense. I appreciate  
13 that.

14 All right. And I don't know if you have any thoughts  
15 or want to be heard on this, Mr. Wadley or Mr. Rhodes.

16 **MR. WADLEY:** Yes, Your Honor.

17 Obviously, you know, we are aware of the company's  
18 motion to compel arbitration or dismiss. We do not believe,  
19 and for the reasons that we'll articulate more fully in our  
20 opposition, that all of the claims that have been raised are  
21 subject to arbitration. We certainly do not believe that the  
22 claim to appoint -- or the request to appoint a custodian is  
23 subject to arbitration. And so that one, at the very least, we  
24 believe ought to go forward expeditiously and be considered  
25 expeditiously.

1           **THE COURT:** Understood. Thank you.

2           All right. Given that, my inclination would be to  
3 brief all three motions simultaneously. If it were the case  
4 that there was a plausible argument that everything should be  
5 subject to arbitration, I might be inclined to brief that  
6 first, but I think -- I think this is messy enough that we  
7 probably should have simultaneous briefing.

8           Now, given that there's a pending motion for  
9 preliminary injunction, I'd like to have the briefing schedule  
10 be expeditious, but also sufficient to allow for adequate  
11 briefing and factual development.

12           Magistrate Judge Oberg recently granted the parties'  
13 stipulated motion to extend the deadline for response briefs  
14 for all three motions to February 2nd.

15           Do all of you believe that gives you adequate time to  
16 prepare your responses?

17           **MR. MOORE:** Your Honor, if I may, no. If we were  
18 going to actually brief the motion for preliminary injunction  
19 fully in preparation for a hearing, if that is the direction  
20 that we are taking, then we'll require discovery on the  
21 allegations upon which that motion is founded in advance of any  
22 response. But I would propose a potential alternative, and we  
23 would propose that the motion to dismiss these counterclaims be  
24 considered first. And I can explain briefly why.

25           If the counterclaims are dismissed, there's no need



1 to proceed with discovery and an evidentiary hearing on this  
2 preliminary injunction, and there's no evidence cited in this  
3 motion for a preliminary injunction other than the allegations  
4 in the counterclaims. So here the allegations and the evidence  
5 are the same. And as set forth in our motion to dismiss, those  
6 allegations fail to state a claim.

7 Without a claim, there's no basis for moving forward  
8 with an evidentiary hearing. Put another way, if the  
9 allegations fail to state a claim, the same allegations  
10 certainly fail to establish a likelihood of success on the  
11 merits of that claim, when considered as evidence. So we  
12 believe it would be more efficient to move forward with the  
13 motion to dismiss first.

14 **THE COURT:** All right. Now, a couple of thoughts on  
15 that. I mean there were some exhibits attached to the motion  
16 for preliminary injunction, I mean but they were things like  
17 the contract, which presumably could be considered in  
18 connection with the motion to dismiss anyway.

19 And I know that there have been declarations filed in  
20 the case before, and at least some -- at least one of those  
21 declarations I note -- I think Mr. Schiermeyer's declaration is  
22 cited in the motion for a preliminary injunction. So I'm not  
23 quite sure -- I want to say I'm not quite sure what evidence  
24 the preliminary injunction is relying on in its entirety.

25 It does reference Mr. Schiermeyer's declaration. It

1 does attach -- it attaches three exhibits. Off the top, I know  
2 one of them is the -- is a contract. I can't remember off the  
3 top what the other two are, but they're documents, they're not  
4 exhibits.

5 Do you want to speak to that, Mr. Moore? I mean are  
6 these things that could be adequately considered on a motion to  
7 dismiss?

8 **MR. MOORE:** I would like to address it briefly,  
9 Your Honor.

10 Those exhibits are the bylaws, the terms and  
11 conditions governing founders' notes and the founders  
12 agreement. All three of those are the documents upon which the  
13 counterclaims are based. So they are -- it doesn't add  
14 anything to the allegations in the counterclaim. That really  
15 it is the universe of the evidence.

16 I believe that the motion also does cite to the  
17 complaint, the allegations of the complaint, but only for the  
18 purpose of saying, look, both parties believe that there's  
19 irreparable harm here. That wouldn't change the fact that the  
20 allegations in the counterclaim are insufficient to state a  
21 claim and that we should consider that issue first.

22 **THE COURT:** All right. And as you said, the  
23 documents attached to the preliminary injunction would be  
24 subject to consideration under -- you know, on a motion to  
25 dismiss. All right.

1 Does -- I guess, Mr. Wadley, or if your colleague  
2 wants to speak to the issue, I don't know who wants to speak to  
3 that, but do you have thoughts about that?

4 **MR. WADLEY:** I do. Thank you, Your Honor.

5 So I think it's important to understand that Wyoming  
6 law permits the appointment of a custodian in the case where  
7 there's a deadlocked board to enable the company to continue to  
8 operate. It's not necessary for an individual -- you know, an  
9 individual that is seeking this relief to demonstrate  
10 wrongdoing or misbehavior on the part of the individuals that  
11 are associated with the company.

12 That's an important -- I think that's a very  
13 important point to consider when thinking about the briefing  
14 schedule. Because in this case, as Mr. Moore has suggested,  
15 discovery would be necessary on the salient point. On the most  
16 important point that goes to the motion to appoint a custodian,  
17 there does not appear to be any dispute, which is that there's  
18 a deadlocked board.

19 And so beyond that -- there's only a two-member board  
20 here, Your Honor, there's Mr. Schiermeyer and then there's  
21 Mr. Thurston. It's a two-member board. They've already  
22 documented, as late as last summer, their opposing views going  
23 forward. And so because of that, I don't think we believe  
24 there's frankly any additional discovery that would need to be  
25 undertaken for the Court to consider and rule on the motion to

1 put in a custodian, simply because all the Court would have to  
2 determine is there's a deadlocked board, that deadlock prevents  
3 the company from operating as it is supposed to operate, and as  
4 a result, in the best interest of the company, the  
5 shareholders, the equity interest owners, the operations, it's  
6 in the best interest of all of those parties and interests to  
7 appoint a custodian to manage the operation of the company  
8 during the pending lawsuit while a number of these claims get  
9 worked out by the Court. So -- yeah.

10 Go ahead, Your Honor. I apologize.

11 **THE COURT:** No, please. I interrupted you. Please  
12 finish.

13 **MR. WADLEY:** No, so because of all that, we don't  
14 believe that there needs to be a resolution on the motions to  
15 dismiss. Because, frankly, irrespective of what happens with  
16 regard to the motions to dismiss, there's still this available  
17 relief to appoint a custodian in an instance where there's a  
18 deadlocked board.

19 So, Your Honor, we believe that that should be  
20 considered straightaway. It certainly can be considered on a  
21 contemporaneous schedule with the motions to dismiss, but we  
22 certainly would not support or agree to any kind of bifurcated  
23 briefing structure where the motions to dismiss get considered  
24 first.

25 **THE COURT:** Okay. Let me ask you this, then.

1           Is it your position that the preliminary injunction  
2       can be decided based on the papers that you've submitted and  
3       argument, perhaps, but without additional evidence or testimony  
4       or any kind of an evidentiary hearing? Is that your position?

5           **MR. WADLEY:** It is, Your Honor.

6           To the extent that the Court is able to take judicial  
7       notice of a deadlocked board, which, again, we believe either  
8       through the briefing, through the positions that have been  
9       asserted and through the material that the Court has already  
10      considered, certainly can take judicial notice of the fact that  
11      there is a deadlocked board here, and, as a result, because it  
12      is permitted under Wyoming law, can resolve this issue and  
13      appoint a custodian to manage the affairs of the corporation  
14      while the remaining dispute gets resolved.

15          **THE COURT:** Okay. So to be clear, you think that you  
16      would be comfortable with my ruling on a preliminary injunction  
17      motion based on what you've submitted and perhaps argument.

18          **MR. WADLEY:** As long as Your Honor rules in our  
19      favor, we would be absolutely comfortable with that resolution,  
20      Your Honor.

21          **THE COURT:** Right. Well, unfortunately you don't get  
22      to make that --

23          **MR. WADLEY:** I understand. I understand.

24          **THE COURT:** But -- no, so -- okay. So you don't  
25      think there's a need for additional evidentiary development,

1 basically.

2 **MR. WADLEY:** We don't.

3 **THE COURT:** Okay. Well, I think -- do you have  
4 thoughts on that, Mr. Moore? If it's just a matter of  
5 briefing, I mean given that the defendant and counterclaim  
6 plaintiff bears the burden on preliminary injunction, if they  
7 think that they're comfortable with the record as it is, is  
8 there evidence that you think you would need to submit in  
9 opposition to it?

10 **MR. MOORE:** Your Honor, on that basis, I think that  
11 with one deposition, with the deposition of the affiant, with  
12 the person who has declared and verified that the allegations  
13 in the counterclaims are true, then I wouldn't have a problem  
14 with it.

15 But our view is that there isn't sufficient  
16 foundation, that this witness doesn't have the personal  
17 knowledge to testify as to things in the verified complaint, it  
18 is largely conclusory. I mean those are issues that we could  
19 raise in a response, but we would much prefer to raise those  
20 after having taken the deposition of Mr. Thurston to flesh  
21 those issues out of it.

22 **THE COURT:** Right. I understand. How much -- do you  
23 think -- I mean -- well, bracket that. I'm not going to ask  
24 you that. I'll ask you that in a minute.

25 Mr. Wadley, are you in line? Do you need the

1       allegations in your counterclaims?

2               **MR. WADLEY:** I don't think so, Your Honor, not for  
3       the purpose of the custodian motion. Again, because the law  
4       permits the court to appoint a custodian when there's a  
5       deadlocked board, it doesn't have to hang on allegations of  
6       misbehavior, impropriety.

7               All of the remaining issues that are in dispute in  
8       this case, frankly, we can efficiently set aside for purposes  
9       of the custodian motion and the Court can simply determine  
10      whether or not there's a deadlocked board and the deadlock  
11      itself prevents the proper functioning of the company.

12              And if the Court makes that determination, then the  
13      Court is then empowered under the Wyoming statute to appoint a  
14      custodian to safeguard the company. It's a provision that  
15      allows the company to continue to operate in a case just like  
16      this where you have a deadlocked board. It's as simple and  
17      straightforward as that.

18              All of the remaining allegations are there, and  
19      certainly, Your Honor, we believe need to be properly vetted  
20      and addressed in discovery and everything else, but we don't  
21      believe they're necessary for purposes of determining whether  
22      or not the Court can and should appoint a custodian at this  
23      point in the litigation.

24              **THE COURT:** So you think that just as long as I take  
25      judicial notice of the fact that there's a deadlocked board,

1 that just based on the bylaws and other things that you've  
2 submitted, I can make the legal determination -- in Wyoming  
3 law, I can make the determination to decide the motion?

4 **MR. WADLEY:** Yes, Your Honor. And there's a very  
5 straightforward reason for that. I mean, as you've seen the  
6 motions for TROs and prelim- -- you know, throughout the file  
7 in this case filed by both parties, the custodian -- the law  
8 that allows a court to appoint a custodian is specifically  
9 designed to address those very issues, right, where there is an  
10 internal corporate dispute, there's a claim that the one  
11 executive is taking, you know, action -- extrajudicial action,  
12 just as we've alleged in this case.

13 There's claims that the board is not properly being  
14 briefed and considered. All of those issues, Your Honor, we  
15 can simply set aside and address by appointing a custodian,  
16 just like a receiver or, you know, some kind of bankruptcy  
17 trustee, to manage the company.

18 And the custodian would certainly be accountable to  
19 the Court to manage the company while these remaining issues  
20 get resolved; thus, preventing the parties from continually  
21 filing these TROs or asking the Court for emergency relief  
22 because they're afraid that one issue needs to be addressed  
23 immediately or another issue needs to be addressed immediately.  
24 We get to set all of that aside and then move forward with the  
25 litigation in regular course. That's what we're seeking at



1 this point.

2 **THE COURT:** And you'd be willing to proceed on that  
3 basis?

4 **MR. WADLEY:** Yes, Your Honor, we would.

5 **THE COURT:** All right.

6 Mr. Moore, thoughts?

7 It sounds like they're willing to basically rely  
8 on -- I mean, I doubt you're going to dispute that the board's  
9 deadlocked. I suspect you'll argue that that doesn't matter,  
10 but assuming I can take judicial notice that the board is  
11 deadlocked and all I look at -- the only things that I look at  
12 is evidence -- and it's not really evidence, I don't know if  
13 that's even the right word -- all I look at is Wyoming law and  
14 the bylaws of your company, is there any reason why we would  
15 need any additional evidentiary development?

16 **MR. MOORE:** Your Honor, if defendants are relying  
17 solely upon a yet-to-be-filed request for judicial notice that  
18 the board is deadlocked, along with the bylaws, and if that's  
19 the entire evidentiary basis on which the defendants intend to  
20 proceed with the motion, no discovery will be necessary, and  
21 we'd be happy to brief that along with the motion to dismiss.

22 **THE COURT:** Right. And to be clear, I mean it would  
23 be the three documents attached to the -- it would be the  
24 bylaws, the terms and conditions, and the founders agreement.  
25 But I think the point is the same; correct?

1           **MR. MOORE:** It is, Your Honor. And the request for  
2 judicial notice, just to be clear, Your Honor suggested that we  
3 couldn't -- you thought that we would oppose the defendant's  
4 contention that the board is deadlocked. We certainly will.  
5 There has been no issue presented to the board for decision  
6 upon which the parties are deadlocked, much less some decision  
7 that would result in some immediate irreparable harm, just to  
8 clarify our position on the record.

9           We will respond to the request for judicial notice  
10 when it's filed and respond to the brief otherwise without  
11 regard to the allegations from the verified complaint which  
12 have been withdrawn as evidence in support of that motion. Is  
13 that correct and fair?

14           **THE COURT:** I understand. I mean I think the  
15 second -- as I said, I -- I'm having trouble how you could  
16 dispute that the board is deadlocked, seeing how you could do  
17 that. I do understand your argument at the end, which, you  
18 know, there hasn't been a question submitted to the board or  
19 that -- you know, and that was what I was trying to capture  
20 with your point that it doesn't matter.

21           I suspect your position is going to be that the  
22 relevant decisions being made are being appropriately made by  
23 the company's officers and don't require board approval so, you  
24 know, whether or not, you know, there's a conflict on the board  
25 wouldn't matter.

1 I guess maybe you're drawing a more specific position  
2 that I could not assume there's a deadlock unless there was  
3 actually a vote properly put to the board on a specific issue.  
4 Is that what you're trying to argue? Sorry you're on mute.

5 **MR. MOORE:** I apologize.

6 Yes, Your Honor. Some issue, there has to be some  
7 issue upon which there's deadlock. For example, the case that  
8 was cited by the defendants, MPEG, there was a -- NASDAQ had  
9 sent a notice to this company and said, "Look, if you don't  
10 reconstitute your audit committee then you're going to be  
11 delisted on X date." So they had an impending harm coming and  
12 they had a particular issue that had to be decided.

13 The board voted two to two. They were deadlocked on  
14 that issue, and so they needed someone to come in and break  
15 that deadlock, less they be delisted by NASDAQ, as promised by  
16 NASDAQ in the warning letter. So --

17 **THE COURT:** Okay. Let me rephrase it, then. I mean  
18 I don't think you can dispute that there are two members of the  
19 board and that they're on opposite sides of this lawsuit.  
20 Correct?

21 **MR. MOORE:** Of course, Your Honor.

22 **THE COURT:** And then I think the question might -- it  
23 might end up being, just as a legal matter, under Wyoming law,  
24 what is required for deadlock and whether the requirements are  
25 met based on those facts. If that's the question, I think we

1 could proceed just as a legal issue, you know, taking as a  
2 given the facts that there are two of the board and they're on  
3 opposing sides of this lawsuit. And you can you could argue  
4 that doesn't mean -- that's not deadlock under Wyoming law.

5 Does that make sense?

6 **MR. MOORE:** It does, Your Honor. And that -- that's  
7 what I was getting at and certainly fair.

8 If the judicial notice is of the fact that there are  
9 two directors and they're on opposite sides of this lawsuit,  
10 both purporting to sue derivatively on behalf of the company,  
11 then so long as that's taken along with our motion to dismiss,  
12 we're happy to brief that at the same time.

13 **THE COURT:** Right.

14 And let me ask you, Mr. Wadley. I mean I don't know  
15 that I can take judicial notice of much more than that.

16 Is that what you need?

17 **MR. WADLEY:** It is, Your Honor. We believe that  
18 that's all, frankly, the Court would need to take judicial  
19 notice of. Additional depositions, at this point, we don't  
20 think would be necessary to document the fact that the board is  
21 deadlocked.

22 And then, of course, to the extent that the  
23 briefing -- if, in the case the briefing revealed that  
24 additional discovery, for one reason or another, was necessary,  
25 I can't imagine at this point sitting here why it would be, but

1 if it was, we could certainly address it at that point.

2 **THE COURT:** All right. The way it would work is that  
3 what I would be taking judicial notice of is simply that there  
4 are two members of the board, that they're on opposite sides of  
5 this lawsuit, that they're both purporting to sue derivatively  
6 on behalf of the company. And then you -- the opposing parties  
7 would be free to argue whether, as a matter of law, that  
8 constitutes deadlock under Wyoming law.

9 **MR. WADLEY:** Certainly, Your Honor, yes.

10 **THE COURT:** Okay. I mean on that understanding, I  
11 propose that we do proceed with simultaneous briefing. If it  
12 turns out that, you know, for some reason I just don't have  
13 enough information to decide the motion for a preliminary  
14 injunction, keeping in mind the respected burdens of proof and  
15 so forth, who bears the burdens, you know, we can consider at a  
16 later date whether we have to engage in discovery or an  
17 evidentiary hearing.

18 But, you know, as I said, we -- effectively, I think  
19 that should satisfy both sides, because the plaintiff -- all  
20 you would have to do on this motion for a preliminary  
21 injunction is briefing. You would not have any duty to -- you  
22 know, you would not need to present any evidence because we  
23 would not be taking the verified complaint as -- I wouldn't be  
24 considering that as evidence.

25 Would that work? Would that work for the plaintiff,

1 Mr. Moore?

2 **MR. MOORE:** Yes, Your Honor.

3 **THE COURT:** All right. Well, on that understanding,  
4 is February 2nd sufficient time for a response?

5 **MR. MOORE:** It is for us to respond to the motion for  
6 preliminary injunction, Your Honor, yes.

7 **THE COURT:** Right. And, again, I anticipate, based  
8 on what Mr. Wadley has represented, that I will decide that on  
9 the papers, maybe with argument, but taking judicial notice  
10 only of the facts I mentioned, and then considering, as a  
11 matter of law, whether that constitutes deadlock.

12 And then -- you know, then also just looking at the  
13 documents that have been presented to me, whether -- you know,  
14 to the extent they're relevant to the question of, you know,  
15 the proper operations of the company and the board and the  
16 respective allocations of authority or whatever. Those could  
17 be relevant, I imagine, to whether there's a deadlock and that  
18 you all can --

19 I'm not suggesting that I have a view on what the  
20 allocation between the board and the officers is or what  
21 deadlock -- what's required for deadlock under law, but I would  
22 just be looking at basically the procedural posture of this  
23 case, the bylaws and other documents that have been given to  
24 me, and Wyoming law, and just try and decide whether, on that  
25 basis, plaintiff can show -- or, excuse me, counterclaim

1 plaintiff, the defendant, can show a likelihood of success on  
2 the merits and the other requirements for preliminary  
3 injunction.

4 Okay. Well, if we have that, so the February 2nd  
5 deadline would work for you.

6 Would -- Ms. Call, would you be filing a response to  
7 the motion for a preliminary injunction as well, do you  
8 anticipate?

9 **MS. CALL:** At this time, the company anticipates  
10 filing something. I don't know that I would call it an  
11 opposition. I think a response is probably the most we would  
12 call it, given that it's based on a claim that's not asserted  
13 against the company, but the company may have an interest in  
14 chiming in about the appointment of a custodian. So that's the  
15 way I would characterize --

16 **THE COURT:** Okay. And --

17 **MS. CALL:** -- but we expect to respond. And  
18 February 2nd would work fine for us.

19 **THE COURT:** Okay. Very well.

20 **MS. CALL:** My only concern -- sorry, Your Honor,  
21 sorry to interrupt. Go ahead.

22 **THE COURT:** No, please go ahead. Your only concern  
23 is what?

24 **MS. CALL:** Is that, if engaging in a response to the  
25 preliminary injunction would somehow waive our argument that --

1 as to the claims that Mr. Thurston and the other  
2 cross-claimants are making against the company, that that would  
3 somehow waive it by engaging in a response to that motion. So  
4 I don't know if Your Honor has any thoughts on that.

5 Of course, we believe all claims against the company  
6 should be submitted to an arbitrator, but given that we're  
7 currently a party and that there's a motion that might impact  
8 the company, we might take advantage of the opportunity to file  
9 a response, acknowledging that doing so shouldn't waive our  
10 ability to still enforce our arbitration provisions in the  
11 agreement between the parties.

12 **THE COURT:** Understood. You're just worried about  
13 the possibility of losing the right to arbitrate or waiving it  
14 through engaging in litigation.

15 Given that you've filed a motion to compel  
16 arbitration, I do not believe there would be a waiver if you  
17 engage in briefing, especially since it will be simultaneous.

18 But does either of the opposing counsel believe that  
19 Ms. Call would waive the right to compel arbitration, if she  
20 has that right, just by filing a response to the briefing on  
21 the other motions simultaneously to the briefing schedule on  
22 her motion?

23 **MR. WADLEY:** No, Your Honor, we don't believe there  
24 is a waiver.

25 **THE COURT:** And do you have a position on that? I



1 don't know that you have a dog in the fight, Mr. Moore, but do  
2 you have a position on that?

3 **MR. MOORE:** You're right, we don't have a dog in the  
4 fight, but we also don't believe that that filing would  
5 constitute a waiver.

6 **THE COURT:** Right. There are circumstances in which  
7 delay -- which filing briefs can constitute waiver. Usually,  
8 it's a conjunction of that with a delay in asserting the right  
9 to arbitrate.

10 I think -- given that you've already set down your  
11 position and filed the motion to compel arbitration, I don't  
12 think that you would be waiving anything, you know, by  
13 participating --

14 **MS. CALL:** Thank you, Your Honor.

15 **THE COURT:** -- you know, by stating your views on  
16 other motions, pending my decision on your motion to compel  
17 arbitration, which you've already made.

18 **MS. CALL:** Thank you, Your Honor.

19 **THE COURT:** Okay. Very well.

20 How much time would be needed for reply briefs after  
21 February 2nd? I guess I'd like all three parties' views on  
22 that since, again, there's three motions. We'd be looking for  
23 replies on all three of them.

24 **MR. WADLEY:** Your Honor, I could bring up the  
25 schedule. I thought that we did allow for a couple of weeks to

1 reply, if I'm remembering correctly. And maybe Ms. Call and  
2 Mr. Moore can correct me on that. I think that the schedule  
3 was tracking on each of the -- the (inaudible) motion and the  
4 motions to dismiss. I believe it was approximately two  
5 thereafter that we would file replies.

6 **THE COURT:** And you're comfortable with that?

7 **MR. WADLEY:** I think so, yeah, Your Honor.

8 **THE COURT:** Is that correct, Mr. Moore? Do you -- is  
9 the deadline set in Judge Oberg's order and are you comfortable  
10 with that deadline?

11 **MR. MOORE:** I'm comfortable with the deadline. I  
12 don't know that it's in the order, but the 16th would be fine,  
13 Your Honor.

14 **THE COURT:** Right. I can't recall off the top  
15 whether that was in there either, honestly. I know that the  
16 February 2nd deadline was in there, I didn't recall if there  
17 was an express deadline for the reply.

18 **MR. MOORE:** There's not. I have the order pulled up  
19 now, at least the docket text order. There's no date for  
20 reply, but the 16th is fine for the plaintiff.

21 **THE COURT:** Right. So Mr. Wadley, would the 16th  
22 work for you? Sorry you're on mute.

23 **MR. WADLEY:** Yeah. Yes, Your Honor. I was just  
24 trying to bring up whether or not, in our planning meeting  
25 report and proposed schedule we had included a separate date,

1 but at this point I think the 16th is just fine. I think we  
2 should be able to put together a reply by the 16th.

3 **THE COURT:** Okay.

4 And Ms. Call, you'll, of course, be wanting to submit  
5 a reply in support of your motion to compel arbitration if  
6 there's any opposition to that. Would two weeks, to the 16th,  
7 give you ample time for that?

8 **MS. CALL:** Yes. Thank you, Your Honor.

9 **THE COURT:** All right. Well, why don't we proceed on  
10 that basis.

11 So February 2nd, February 16th for the response and  
12 the replies respectively to all three motions. I will --  
13 depending on how things develop -- I think it's quite likely  
14 that I will hold a hearing to give the parties an opportunity  
15 to argue the motions. I think with all -- with three motions,  
16 the likelihood that I'll feel comfortable deciding them all  
17 without argument is probably not high. But I will get -- once  
18 I've read the briefs, I will reach out through my chambers to  
19 counsel to set a date for an argument.

20 Again, I'm not -- given the position the counterclaim  
21 plaintiff and defendants have taken here, I don't anticipate  
22 that we will be looking to hold an evidentiary hearing or have  
23 evidence on the preliminary injunction. If, for some reason,  
24 something comes up where I feel that I simply just cannot  
25 decide it based on the information before me, we'll decide how

1 to proceed. You know, whether that means ruling first on the  
2 motions to dismiss and to compel arbitration and seeing if we  
3 need to have discovery on the other, but I will -- but I  
4 anticipate that I will likely and, in accordance with what  
5 Mr. Wadley has requested, just try and decide the motion based  
6 on what we've discussed here without further factual  
7 development.

8 Okay. All right. On that -- so we'll proceed on  
9 that basis.

10 Any questions about that before we move on?

11 **MR. MOORE:** Your Honor, I do have one question that  
12 just occurred to me. And that is, I will now be filing a  
13 response to a motion that is quite different than the one  
14 that's in writing, with all the evidence stripped from that  
15 motion, other than what we've discussed today. So our response  
16 will track what we've discussed in court today.

17 But in addition -- and I don't know that we will, but  
18 if the plaintiff intends to submit its own evidence in response  
19 to what is included, evidence that the defendants have limited  
20 their motion to, I don't see that there would be any  
21 prohibition against us doing that. Is that correct?

22 **THE COURT:** I assume so. I don't know what evidence  
23 you'd be looking at. That's -- I mean, again, when I said I  
24 don't anticipate right now a need for discovery or factual  
25 development or an evidentiary hearing, I mean certainly if the

1 plaintiff does submit evidence, that might change that  
2 calculus. That's the sort of thing I was considering when I  
3 said I would bracket the question of whether we would need any  
4 additional development.

5 And so, you know, if you do submit a -- you know,  
6 declarations and so forth, that could well change the calculus  
7 of what is needed. But we'll cross that bridge when we come to  
8 it.

9 **MR. MOORE:** Understood. Thank you, Your Honor.

10 **THE COURT:** And I -- again, if -- again, and to be  
11 clear, Mr. Moore, if you do submit declarations then, you know,  
12 it would not surprise me that -- if the counter-claim plaintiff  
13 at that point decided that they wanted to try and submit  
14 something in the reply brief, and then we would have to figure  
15 out how to proceed, or they might want to -- at that point,  
16 want to say, "Well, we're going to need our verified complaint  
17 after all" to oppose these declarations. So I think we'll have  
18 to see how it goes.

19 Any other questions or thoughts about that?

20 **MR. MOORE:** No, Your Honor. I understand completely.  
21 Thank you.

22 **THE COURT:** Yeah. I mean I think, Mr. -- I don't  
23 want to put words in your mouth, Mr. Wadley, but I assume that  
24 your willingness to rest on Wyoming law, the facts that I  
25 mentioned that I think are undisputable, that there's two

1 members of the board, they're on opposing sides of this  
2 lawsuit, that they both are purporting to sue derivatively on  
3 behalf of the company, and then, you know, the documents that  
4 you've attached to the preliminary injunction, I assume your  
5 willingness to rely solely on those materials -- you know, and  
6 not in your statement that you don't need the allegations in  
7 the verified complaint, that that could change if the plaintiff  
8 comes back with a bunch of evidence in their response brief.  
9 So I'm not going to hold you to that in that case, at which  
10 point, you know, you could submit whatever you wanted in your  
11 reply brief and then we would have to figure out how to  
12 proceed.

13 Does that -- and to be clear, whatever you wanted  
14 that's responsive to what the plaintiffs, that's not -- it  
15 wouldn't necessarily open the whole world of evidence, it would  
16 just open the world of evidence that's responsive to whatever  
17 the plaintiff comes forward with if they have evidence.

18 Is that fair and reasonable, Mr. Wadley, does that  
19 make sense?

20 **MR. WADLEY:** It is, Your Honor. And that does make  
21 sense. You know, we believe it's a very straightforward  
22 analysis. We intended to brief it that way, certainly the  
23 position that we have here, and I'm willing to move forward on  
24 that. And to the extent that that posture changed at all, you  
25 know, we're willing to reconsider, but we think that it's a

1 pretty reasonable position going forward.

2 **THE COURT:** All right. So just with that -- with  
3 that caveat, Mr. Moore, I mean you're free to submit what you  
4 want in your response, on the understanding that if you do  
5 submit evidence, I will allow the plaintiff in the reply brief  
6 to submit evidence that's responsive to your evidence. I don't  
7 think it will necessarily open up the whole world to things  
8 that are not responsive to your evidence.

9 Okay. Any other questions?

10 All right. Is there anything else we should discuss  
11 while we're together at this time?

12 **MR. MOORE:** Not from the plaintiff's perspective,  
13 Your Honor. That's all we intended to address.

14 **MR. WADLEY:** Nothing here, Your Honor.

15 **MS. CALL:** Nothing for the company. Thank you, Your  
16 Honor.

17 **THE COURT:** All right. Well, thank you. I will  
18 anticipate receiving your briefs as the schedule that we've  
19 discussed. And then, as I said, I will have my chambers reach  
20 out to you, most likely, to set a date for argument as soon as  
21 the briefing is -- or shortly after the briefing is completed.  
22 All right. With that, court is adjourned. Thank you.

23 **MR. MOORE:** Thank you.

24 **MR. WADLEY:** Thank you, Your Honor.

25 (Concluded at 2:50.)

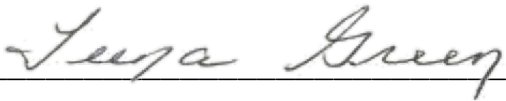
## 1 CERTIFICATE OF COURT REPORTER

2  
3 This is to certify that the proceedings in the  
4 foregoing matter were reported by me in stenotype and  
5 thereafter transcribed into written form;

6 That said proceedings were taken at the time and  
7 place herein named;

8 I further certify that I am not of kin or otherwise  
9 associated with any of the parties of said cause of action and  
10 that I am not interested in the event thereof.

11 In witness whereof I have subscribed my name this 9th  
12 day of January 2024.

13  
14 A handwritten signature in cursive script, reading "Teena Green", is written over a horizontal line.

15 Teena Green, RPR, CSR, CRR, CBC  
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